

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

LAND APPEAL NUMBER 11 of 2012

(Originating from the EX PARTE JUDGMENT and DECREE of the District Land Housing Tribunal for KINONDONI District at MAGOMENI-Land Application No. 318 of 2011-L. Hemed-Chairman)

MOZA MOHAMED ZAIDI.....APPELLANT

VS

MOHAMED ABDALLAH PEPO.....RESPONDENT

JUDGEMENT

Date of last Order: 17-09-2012

Date of Judgment: 30-11-2012

JUMA, J.:

The appellant Moza Mohamed Zaidi is aggrieved by the *ex parte* Judgment and Decree of the District Land Housing Tribunal for KINONDONI District which sat at MAGOMENI to hear the Land Application No. 318 of 2011. She has come to this court to appeal against the decree declaring the respondent, Mohamed Abdallah Pepo as the rightful owner of a disputed house, and in ordering him to vacate from that house. In his three grounds of appeal, Mohamed Zaidi believes that the Tribunal Chairman was wrong to proceed to hear the application *ex parte* without considering her position and

should not have struck out the written statement of defence which she had filed out of the time the Tribunal had earlier prescribed. In her appeal, Ms Zaidi would like this court of first appeal to order the trial Tribunal to hear the application afresh.

In order to appreciate the grounds of appeal framed in the memorandum of appeal, it is necessary to reflect the salient facts appearing from the record of the trial court.

In his application which he filed in the District Land and Housing Tribunal for Kinondoni, Mohamed Abdallah Pepo claimed that sometime in March 2011; the respondent Moza Mohamed requested for a loan of Tshs. 11,000,000/= to bolster up her business. In return for that loan, Ms Zaidi pledged her house Number KND/MZM/IDR14/33 located at Mzimuni Ward along Iddrissa Street of Kinondoni Municipality.

On 18 March 2011 Mr. Pepo advanced that loan to Ms Zaidi on the understanding that the loan would be paid back within three months and in case of default the house would be surrendered to Mr. Pepo. The trial tribunal was told that on 19 June 2011; Ms Zaidi having failed to honour her part of the agreement within the stipulated time, agreed to execute a sale agreement to facilitate a transfer of the house to Mr. Pepo.

It appears that Ms Zaidi failed to vacate the house; hence Mr. Pepo's application that the trial Tribunal should declare him to be the rightful owner of that house. He also wanted the Tribunal to evict Ms Zaidi, and to order the appellant to pay a monthly rent from the time she was supposed to have vacated the house.

The hearing of this appeal was by way of written submissions. Expounding on his grounds of appeal, Ms Zaidi submitted that he was very ill and outside of Dar es Salaam when Mr. Pepo filed his application at the trial Tribunal. The summons was served on her son who was a minor at the time. She only learnt of the case from her relatives before she belatedly begun to process her written statement of defence. Her application for extension of time was rejected by the Tribunal Chairman. In her submission, Ms Zaidi also referred this court to Regulation 7 (3) (a) of the **Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003** which allows the Tribunal Chairman to extend time upon showing of good cause. Ms Zaidi contended that her ill health and her absence from Dar es Salaam were good causes which should have been considered by the Tribunal Chairman. Ms Zaidi also

submitted that the Tribunal Chairman should not have believed the evidence of Mr. Pepo, which was fraudulent.

Mr. Pepo's written submissions were filed on his behalf by Mr. G.B. Taisamo, learned Advocate. The learned Advocate submitted that looking at the circumstances leading up to the *ex parte* judgment and the decree, Ms Zaidi the appellant should have applied first to set aside the *ex parte* decision instead of directly filing this appeal. Mr. Taisamo referred me to Order IX Rule 13 (2) read together with Order VIII Rule 14 (2) (b) of the **Civil Procedure Code, Cap 33** to support his contention that this appeal is not sustainable and appellant should have applied to set the *ex parte* judgment aside within 21 days of its delivery.

I propose first to deal with the question of jurisdiction arising from the submission made by Mr. Taisamo on behalf of the respondent, on whether the appellant should have first sought to set aside the *ex parte* judgment of the Tribunal instead of appealing to this Court against that *ex parte* judgment. I should also point out that the **Land Disputes Courts Act, 2002 CAP. 216, RE 2002** has clearly directed that, while exercising their respective jurisdictions over land matters,

the High Court and the District Land and Housing Tribunals should apply the **Civil Procedure Code, Cap. 33** and the **Evidence Act, Cap. 6**. The relevant direction is contained under section 51 (1) of Cap. 216 states:

*51 (1).- In the exercise of the respective jurisdictions, the High Court and District Land and Housing Tribunals shall apply the **Civil Procedure Code, 1966** and the **Evidence Act, 1967**-*

I have considered the submissions made in support of the positions taken by the parties. In my opinion based on the precedent set by the Court of Appeal on interpretation of *ex parte* judgments delivered under the terms of the **Civil Procedure Code**, the only way open to the appellant in this appeal was to go back to the District Land and Housing Tribunal for Kinondoni and set aside the *ex parte* judgment. She should not have appealed directly to this court. This court of first appeal does not take evidence in order to determine whether summons was served upon the appellant's son as alleged by the appellant. It is also not for this court of first appeal to determine whether appellant had sufficient reasons to explain her failure to file his statement of defence within time.

There is a chain of the decisions of the Court of Appeal exhorting applications to set aside *ex parte* judgments to be filed in the same courts that passed such judgments instead of directly appealing against such *ex parte* judgments. While delivering the Judgment of the Court of Appeal Ramadhani, JA (as he then was) in the **Government of Vietnam Vs. Mohamed Enterprises (T) Ltd, Civil Appeal Number 122 of 2005 (unreported)** considered the question whether it was proper for the appellant to appeal and not to go back to the High Court to set aside the *ex parte* judgment and have the matter heard *inter partes*. The Court of Appeal did not consider that it was proper for it to step into the shoes of the High Court and make decisions purely from submissions from the bar without there being evidence. Dismissing the direct appeal against an *ex parte* judgment, the Court of Appeal held that the proper course of action was to apply to set aside the *ex parte* judgment and thereafter conducting a full trial. This decision was echoed again in the case of the **CRDB Bank (1996) LTD vs. Morogoro Farm and Transport Services (1985) Ltd Civil Application No. 61 of 2010**. The Court of Appeal on page 4 of the judgment delivered by Nsekela, JA:

*"With respect we agree with the learned Advocate for the applicant that after the High Court had entered an ex parte judgment on the 1.9.2008, the course of action open to the applicant was to make an application to set aside the ex parte judgment and not to appeal as discussed in the **Government of Vietnam vs. Mohamed Enterprises (T) Ltd, Civil Appeal No. 122 of 2005 (unreported).**"*

The submission by Ms Zaidi, contending that she was very ill and outside of Dar es Salaam, when Mr. Pepo filed his application at the trial Tribunal is not supported by what appears on the record of the trial Tribunal. It is on the record that on 29 September 2011 Ms Zaidi was represented by Advocate Charles whereas Mr. Pepo was represented by Advocate Msemu when the two disputing parties appeared for the first time before the trial Tribunal. Mr. Msemu asked to be served with Ms Zaidi's written statement of defence. Mr. Hemed the presiding Chairman of the Tribunal ordered Ms Zaidi to file her defence by 5 October 2011 and mentioned the matter on 28 October 2011. Advocate Msemu appeared to represent Mr. Pepo. Neither Ms Zaidi nor her own learned Advocate Charles appeared before the Tribunal on the 28th October 2011 which

was the date scheduled for a mention of the application. On 18 November 2011 learned Advocate Taisamo who appeared on behalf of Mr. Pepo for the mention, reminded the Tribunal about the outstanding Order to Ms Zaidi to file her defence which had not been filed.

Although Mr. Taisamo asked for the leave of the Tribunal to proceed with the hearing of the application *ex parte*, the Tribunal Chairman mentioned the application on 25 November 2011. According to the Tribunal Chairman Ms Zaidi was supposed to have filed her defence by 5 October 2011 as directed by the Tribunal. It appears that she had filed that defence on 25 November 2011 without any leave of the Tribunal. This prompted the Tribunal on 25 November 2011; to not only strike out that written statement of defence but to order the *ex parte* hearing of the application to begin on 19 January 2012.

This first court of appeal is not the forum where the appellant Ms Zaidi can lead her evidence to prove that she was ill and outside Dar es Salaam. Appellant should take this evidence back to the District Land and Housing Tribunal to support her application to set aside the *ex parte* Judgment and

Decree. In my opinion, the law settled by the Court of Appeal prohibiting direct appeals against *ex parte* judgments and decrees of trial courts also applies to the District Land and Housing Tribunals which apply the provisions of the **Civil Procedure Code, Cap. 33**. Therefore, no appeal against an *ex parte* decision of the District Land and Housing Tribunal shall lie to the High Court through the avenue of section 38 (1) of the **Land Disputes Courts Act, 2002**.

In the upshot, this Land Appeal Number 11 of 2012 is incompetently before this court and is hereby struck out. Respondent is awarded his costs.


I.H. Juma
JUDGE
30-11-2012

Court:

Judgment is delivered in presence of Mohamed Abdallah Pepo (Respondent) and in the absence of the appellant.


I.H. Juma
JUDGE
30-11-2012

